



## Hawthorne v. American Mortgage, Inc.

--- F.Supp.2d ---, 2007 WL 1536859 (E.D. Pa.)  
May 25, 2007

by *Lauren W. Taylor, Esq.*

The U.S. District Court for the Eastern District of Pennsylvania held that a mortgage broker did not act as a mortgage lender's agent under Pennsylvania law, and, therefore, the broker's conduct in promising financing to borrowers could not be attributed to the lender.

In this case, the borrowers brought a claim against the broker and lender alleging that they lost the opportunity to purchase their dream home after the broker, who had promised the borrowers that the lender would provide mortgage financing on the day of closing, failed to show up at the closing. The borrowers' claims against the lender were premised on their contention that the broker was acting as the lender's agent.

The borrowers submitted a Universal Residential Loan Application to the broker, along with a Mortgage Loan Origination Agreement that stated the broker had entered into "separate independent contractor agreements" with various lenders. Thereafter, the broker informed the borrowers that their mortgage application had been conditionally approved by the lender, with "all conditions to be finalized by underwriting." Shortly before the scheduled closing, the broker accessed the lender's software to analyze the borrower's loan application, which informed the broker that it had to submit an application in order to proceed. Based on the borrower's mortgage application, the lender determined that it did not meet the lender's underwriting conditions. There was no contract between the borrowers and the lender, and the borrowers had no communications with the lender during the loan application process.

The court granted summary judgment for the lender and held that an agency relationship was not established between the broker and the lender. First, the broker's access to the lender's internal proprietary software, which was merely a tool that allows a broker to analyze, based on hypothetical facts, whether the lender would approve funding to a hypothetical borrower, was not a basis for finding an agency relationship. Second, the lender's policy of relying on brokers to communicate with borrowers did not make such brokers the lender's agents. Third, the broker's status as a "correspondent bank" was not indicative of an agency relationship. Finally, the lender's occasional use of the word "partner" when referring to the broker did not make the broker and lender partners in the legal sense of that term.

The court also held that the broker did not exercise apparent authority to bind the lender to a contract with the borrowers. Apparent authority is where the principal knowingly permits the agent to exercise power to bind a principal or if the principal holds the agent out as possessing such power. Typically, this concept arises in insurance broker cases. The

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general rule in such insurance cases is that the broker is the agent of the insured who purchases insurance, not the agent of the insurer who issues it. Applying this concept to mortgage broker cases, the court determined that if mortgage brokers are like insurance brokers, they are the agents of the mortgagors and not the mortgagees. As such, the court found the broker was not the lender's agent.

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